

No. 44: *2dly*, The pursuer has a direct interest to pursue, as his plea goes to annul the very debt, in security of which his bills were granted. Besides, the action, on account of usury, is competent *cuilibet e populo*.

3dly, Every device, by which more than 5 *per cent.* is obtained for the use of money, falls under the denomination of usury. A banker is sufficiently rewarded for his trouble in various ways, such as the profit in discounting bills, and lending money at a higher interest than what he pays, without charging commission; and accordingly no such charge is made by any respectable private banker.

The Lord Ordinary sustained the defences, and found the pursuer liable in expenses.

On advising a reclaiming petition, with answers, replies, and duplies, the Court, without entering into the preliminary defences, considered it as fixed by the decision in the case of Foggo, that Mr. Playfair's allegations, although made out, did not amount to usury. It was observed, however, that if Bertram, Gardner, and Company, had charged more than one half *per cent.* of commission, ascertained by a report of bankers in the case of Foggo, to be the customary charge; or in selling London bills, had drawn them at longer dates than the usual par; their conduct in both respects had been exceptionable; and that the balance due by Simpson, in so far as it had arisen from these practices, should be disallowed.

The Lords "adhered."

A similar judgment was pronounced in the case of Gilbert Grierson against Bertram, Gardner, and Company, 6th June, and 21st November, 1797.

Lord Ordinary, *Glenlee*. Act. *Abercromby*. Alt. *Fraser Tytler*. Clerk, *Sinclair*.

R. D.

Fac. Coll. No. 2. p. 3.

1800. *May 15.* WILLIAM WALKER, and Others, *against* ROBERT ALLAN.

No. 45.

How far bankers are entitled to charge commission, besides interest, on bills discounted, and accounts-current?

Sinclair and Williamson, merchants in Leith, had been in the practice of transacting business with Robert Allan, banker in Edinburgh, from 1793 to 1796, when they became bankrupt. At this time there was a balance of above £.900 in his favour, for which he held a deposit of bills in security.

From the various accounts he had settled with the bankrupts, it appeared that he had been accustomed to charge commission on his accounts-current, as also on some of the bills discounted by him, and that on other occasions, instead of charging commission, he did not allow the usual exchange on bills. The rate of commission charged on bills, varied according to circumstances, from above 1 *per cent.* to a much less sum; and upon his whole transactions with the bankrupts, the *extra* charge, above interest, was under one-fourth *per cent.*

William Walker, and some other creditors of Sinclair and Williamson, above two years after the bankruptcy, brought an action against Mr. Allan, concluding for reduction of his settled accounts and claims, as being usurious, and also for penalties, in terms of 12th Anne, C. 16.

The defender contended, That the right of action was cut off by the prescription introduced by 31st Eliz. C. 5.; see Ersk. B. 4. Tit. 4. § 110.; Bankton, B. 2. Tit. 12. § 22.; 13th January, 1647, Booksellers of London against Booksellers of Edinburgh, No. 341. p. 11143. While the pursuers maintained, that this statute did not apply to Scotland; 2d December, 1766, Mackechnie against Wallace, No. 38. p. 16433; Hume, vol. 2. p. 386.; and that the defence was, besides, barred by specialties.

On the merits, the pursuers

Pleaded: A charge for commission, in addition to interest at five *per cent.* (at least to the extent made by the defender,) is an evident violation of 12th Anne, C. 16. which strikes at every device by which a higher advantage than legal interest may be taken. No such charge is made by the public banks, nor by the chief private bankers in Edinburgh; and it is unreasonable in itself, as bankers, even when they do not issue notes, have sufficient profits from the difference of interest paid and received by them, exchange, and other legal sources.

Answered: The charge of commission is not to be considered as usurious, but as a reasonable indemnification for the trouble and expense connected with the business performed. It is a common charge with private bankers in Edinburgh, and indeed over Europe. To the extent of one-half *per cent.* it was solemnly recognised by this Court in the case 1768, Creditors of Pitcairn against Fogo, No. 39. p. 16433.

The defender's charge varied according to the trouble and expense attending each transaction, which were fully in the view of the parties when the accounts were settled by them. It did not amount to one-fourth *per cent.* upon the whole accounts; and it is from the profits made on the whole, and not from that on detached articles in the accounts, that the propriety of the defender's charges is to be determined.

Replied: The merits of the present case are to be decided, not by a complex view of the whole accounts, but by taking the transactions separately. The fairness of the charge upon one bill, will not justify an usurious advantage upon another.

The Lord Ordinary reported the cause on informations.

Observed on the Bench: There is no occasion to decide the defence of prescription, upon which the former decisions have been contradictory, because the present action is clearly ill founded on the merits. The whole accounts must be taken as an *unum quid*, and not divided into separate articles. The defender's charge upon the whole is less than what was recognised in the case of Fogo, and in the later one, 6th June, 1797, Playfair, No. 44. p. 16438.

No. 45. The Lords unanimously “found it unnecessary in this case to give judgment upon the defence of prescription; found there is no ground for the charge of usury brought against the defender, and therefore sustained the defences upon the merits; assoilzied and decerned,” and found the pursuers liable in expenses*.

Lord Ordinary, *Craig*. Act. *Solicitor-General Blair, J. Clerk, Ar. Campbell, junior.*

Alt. *Mat. Ross, C. Hope.*

Clerk, *Sinclair.*

D. D.

Fac. Coll. No. 175. p. 396.

Usury in Adjudications; See ADJUDICATION.

See APPENDIX.

* Upon appeal, the cause was remitted to the Court of Session “to review the interlocutors complained of generally.”—See APPENDIX.